



## WHICH KIND OF PARTY? THE ROLE OF CRIME VICTIMS IN CHINESE CRIMINAL PROCEDURE

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*Criminal procedure in China was an inquisitorial one before the 1996 amendment to the Criminal Procedure Law. The amendment introduced a series of “adversarial” elements and constructed criminal trial as a contest between the prosecutor and the defendant. There is a widely shared presumption that victims may play a more active role in an inquisitorial system than in an adversarial system. However, China’s case presents a counterexample. The new “adversarial” system in China recognises the victim as a “party”, enjoying equal procedural rights with the defendant. This article examines the procedural rights guaranteed to victims by the amended criminal procedure law, identifies the major changes in the role of victims, and evaluates the effectiveness of these doctrinal changes. The central argument is that, with a largely policy-implementation orientation, the Chinese system is unlikely to endorse victims’ rights to the extent of sanctifying victims’ autonomy. The system is more likely to accept a “punitive victims’ rights” model, which would subsume victims’ interests in the larger policy objective of crime control. The development of welfare rights and informal arrangement of restorative justice may be more beneficial for victims than the codification of formal participatory rights in China’s current political and legal context.*

### Introduction

Mr Chang’s motor cycle was stolen by his neighbor Mr Jin. A few days later Mr Chang found his motor cycle in a repair shed with major parts removed. He was very angry and reported the case to the police. During the course of police investigation, Jin felt pressured and nervous. He confessed to the victim and asked for a deal. Chang agreed and they signed a “contract” which provided that Jin should pay 3,000 yuan to Chang and Chang should stop pursuing the case. Several months after Jin paid the compensation, the police solved the case and arrested him. He was subsequently convicted of larceny and sentenced to nine months’ imprisonment. After serving

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his term, Jin asked Chang to return the 3000 yuan and Chang refused. Jin thereafter sued Chang for restitution. The court of Deng Feng City actually accepted and tried the case. The judgment was a surprise to both parties: the “contract” was declared invalid because of its unlawfulness, the 3000 yuan was to be confiscated, a fine of 500 yuan was imposed on each party for entering into such an illicit contract.<sup>1</sup>

This case shows clearly how criminal justice sometimes works against the will and interests of the victim. When a crime enters the purview of the system, it becomes the monopolised “province and duty”<sup>2</sup> of the judicial system to say how to deal with it. The victim cannot solve his / her dispute with the offender privately. Judge Chen, the presiding judge of this case, made such an illuminating comment to the media: “the case sends such an alarm to the people: Whatever you do, do it lawfully. Whenever your rights are violated by a criminal suspect, report to the judicial organ and see it be dealt with according to law. Do not solve the problem privately. Otherwise you will encounter a similar situation with Mr. Chang.”<sup>3</sup> The essential message is that in criminal cases victims are represented and their interests are taken care of by the state. The following case can show us how this actually works.

Wang Qiong was a young lady working in Panjin City in Liaoning Province. One day, she was escorted home by Shen Tiexin, whom she barely knew. While in her room, he asked for sexual intimacy and she refused. In the course of tussle, she fell from the 5<sup>th</sup> floor, resulting in a smashing fracture of her neck vertebra. With high-positioned paraplegia, she couldn’t eat or drink without help. The district court convicted Shen of attempted rape and sentenced him to 15 years’ imprisonment. Wang also sued him in a supplementary civil action. The court rendered a decision requiring Shen to pay 170,916.4 RMB as restitution. The judgment was confirmed by an appellate court. However, Shen was unable to pay. Wang’s family spent 200,000 RMB on her medical treatment, of which 150,000 was borrowed from relatives and friends. Her entire family depended on the 600 RMB monthly income of Wang’s father for living. Without hope of recovery, Wang begged her family to kill her. Her father couldn’t bear seeing his daughter suffer so much and finally killed her. He was convicted of murder

<sup>1</sup> See “Touchezei zhuanggao shizhu” (“Owner of Lost Property Sued by the Thief”), *Ershiyi shiji jingji baodao* (21<sup>st</sup> Century Economic Report), 27 Feb 2002.

<sup>2</sup> I borrow these terms from Justice John Marshall, who said: “It’s emphatically the province and duty of the Judicial Department to say what the law is.” See his opinion in *Marbury v Madison*, 5 US 137 (1803).

<sup>3</sup> See n 1 above.

with mitigated reasons and sentenced to three years' imprisonment with three years' suspension.<sup>4</sup>

In this case, Miss Wang was disappointed by the judicial process. She received a judgment but nothing more. After being seriously harmed by a crime, she had to rely upon her needy family for care. Her family exhausted its full capacity and despaired. For Wang Qiong, the recovery or restitution was clearly more important than retribution on the offender. Traditional ideas of criminal justice, whose spectrum covers only the policy goal of crime control and constitutional concern of due process, cannot help victims in substantive terms. To take victims like Wang Qiong's interests seriously, we must reform both the institutional structure and underlying ideas of justice in the criminal justice system. As Nils Christie capably summarised,

In a modern criminal trial, two important things have happened. First, the parties are being *represented*. Secondly, the one party that is represented by the state, namely the victim, is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena, reduced to the triggerer-off of the whole thing.<sup>5</sup>

By juxtaposing these two cases, a dilemma appears: on the one hand, the state intends to monopolise the penal process by looking after victims and punishing criminals; on the other hand, due to either institutional design or practical constraints, victims' interests are frequently ignored. This dilemma gives momentum to the current research. In the following sections, I shall examine (1) the current theoretical models of criminal procedures in light of their explanatory power on the victims' role in China's criminal procedure, (2) current formal legal framework of victims' participation in China's penal process, (3) the development of informal practices redressing victim's plight. After these analytical and descriptive sections, I shall draw some normative and propositional conclusions. My central arguments shall be: although victims' rights can be systematically and comprehensively written into the statute, those rights shall mean little for victims without a supporting structure in state authority and judicial process. If no radical reform takes place in the near future, concurrent development of state-supported welfare benefits for victims and informal (negotiated) criminal justice may serve victims' interests better.

<sup>4</sup> For an account of this case, see Fu Jianfeng, "Nu'er shouhai bukan zhemo, laofu renting shanu" ("Victimized Daughter Cannot Bear the Suffering, Elder Father Took Great Pain to Kill Her"), *Nanfang Zhoumo* (Southern Weekend), 27 April 2006, p1159014. Available at: <http://www.nanfangdaily.com.cn/southnews/zmzg/200604270577.asp>.

<sup>5</sup> Nils Christie, "Conflicts as Property," (1977) 17 *British Journal of Criminology* 1, 3.

## Analytical Framework

Crime is not a natural existence which can be identified by applying objective standards; it is a social and legal construction. In China, a crime is defined by law as:

“an act that endangers the sovereignty and territorial integrity of the state; endangers the system of the dictatorship of the proletariat; undermines the socialist revolution and socialist construction; disrupts public order; violates rights of property owned by the whole people or collectively owned by the working people; violates the citizens’ privately owned lawful property or infringes upon the citizens’ rights of the person and their democratic and other rights; and any other act that endangers society and is punishable according to law. However, an act that is clearly of minor importance and little harm shall not be considered a crime.”<sup>6</sup>

Thus defined, victims are marginalised and rarely referred to in substantive criminal law. As summarised by some leading scholars in China, there are three essential elements in crimes, namely, social harmfulness, violation of criminal law and punishability.<sup>7</sup> Although a crime’s impact on its victim may be considered a factor in its social harmfulness, the victim’s perspective is an indispensable component in the state’s perception on crime and punishment.

Criminal procedure is designed to identify crimes and match sentences with crimes. The conceptual framework of substantive criminal law gives shape to the formal arrangement of criminal procedure. If victim’s perspective is only marginally relevant to the crime as recognised by the substantive criminal law, victims shall not be allowed to play a significant role in the procedure. Criminal procedure is organised as an affair between the state and the defendant. Crimes intrude on the peace of the sovereign, referring to either the king or the people. A crime is not a private affair between the offender and his / her victim. In China, since 1949, an official called the “people’s procurator” represents the people to prosecute crimes. Unlike in civil cases, dispute resolution is not the major concern in criminal trials. If crimes are not disputes between private persons, criminal procedure is to be considered as operating in a bipolar structure, either symmetrical or unsymmetrical. On one pole lies the state serving the purpose

<sup>6</sup> *Zhonghua renmin gongheguo xingfa* (Criminal Law of the People’s Republic of China), Art 10, adopted in 1979 and amended in 1997.

<sup>7</sup> This kind of generalization can be found in almost every treatise on criminal law. For an authoritative one, see Gao Mingxuan (ed.), *Xingfa xue yuanli* (General Principles of Criminal Law), (People’s University Press, 2005), p 382.

of crime control, while defendants strive to defend their rights on the other pole. Courts serve as the umpire and find balance by fine-tuning the poise between these two poles. Victims' interests are to be incorporated into the prosecutors' calculation of social harm inflicted by crimes. There is no procedural role for victims to play.

To be fair, the state can and does take care of victims' interests. However, the victim and the state inevitably hold different perspectives on the nature of the offence and different expectations on the way it should be dealt with. To the victim, the offence is a personal matter requiring reparations for the material and emotional harm suffered. To the state, it is a violation of criminal law and disturbance of social order, requiring a consistent, predictable, and equitable legal response.<sup>8</sup> When victims' interests are taken care of by the state, the victim's perspective become "subjugated knowledges," which is personal, local, nonconceptual, insufficiently elaborated, and thus hierarchically inferior<sup>9</sup>. Without an active role in the criminal process, victims' interests cannot be guaranteed by proxy.

A victim having an active role is regarded as more compatible with an inquisitorial system of criminal justice than with an adversarial one<sup>10</sup>. However, China's experience presents a counter-example to this widely shared observation. Before the 1996 amendment to Criminal Procedure Law ("CPL"), China's criminal procedure was purely an inquisitorial one. However, victims were not recognised as "parties" to a criminal case. They were not even guaranteed a notice for the trial. The 1996 amendment aimed to introduce some adversarial elements into the system.<sup>11</sup> Surprisingly, a victim's role has also been significantly enhanced. Formal status as a "party" has been bestowed on the victim, together with many rights comparable

<sup>8</sup> See Matti Joutsen, "Victim Participation in Proceedings and Sentencing in Europe," (1994) 3 *International Review of Victimology* 57-67.

<sup>9</sup> On the concept of "subjugated knowledges," see Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975-76*, translated by David Macey (St. Martin's Press, 2003), p 7.

<sup>10</sup> For an account on victims' active roles in inquisitorial systems, see Matti Joutsen, "Listening to the Victim: The Victim's Role in European Criminal Systems," (1995) 34 *Wayne L. Review* 95; Pizzi, T. William and Walter Parron, "Crime Victims in German Courtrooms: A Comparative Perspective on American Problems," (1996) 32 *Stanford Law Review* 37; and Scott P. Boylan, "Coffee from a Samovar: The Role of the Victim in the Criminal Procedure of Russia and the Proposed Victims Rights Amendment to the United States Constitution," (1998) 4 *U. C. Davis Journal of International Law and Policy* 103. For the structural and normative constraints on victims' role in criminal procedure, see Jonathan Doak, "Victims' Rights in Criminal Trials: Prospects for Participation," (2005) 32:2 *Journal of Law and Society* 294; and Ian Edwards, "An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making," (2004) 44:6 *British Journal of Criminology* 967.

<sup>11</sup> See Guangzhong Chen & QiuHong Xiong, "Xingshi Susongfa Xiugai Chuyi (xia)" ("Preliminary Studies on the Amendment to Criminal Procedure Law, Part II"), (1995) 5 *Zhongguo Faxue (Chinese Legal Science)* 85-91. The amendment introduced the suspects' right to meet their lawyers at the investigation stage, defense lawyers' access to the prosecution's files, cross-examination during the trial, etc.

with those enjoyed by the defendant. Obviously, the two models of criminal procedure, inquisitorial vs adversarial, cannot help us to comprehend the current situation of victims' rights in China. To begin with, we should clarify the nature of victims' rights.

Victims' rights should be considered as claim-rights, in Hohfeld's terms, because they are correlative to someone else's duties.<sup>12</sup> Unlike liberty-rights, whose existence and realisation require the absence of claims, claim-rights can only be realised when the correlative duty-bearers actively do something. Therefore, to discuss victims' rights meaningfully, we should identify the duty-bearers against whom victims can make claims. In his statement to the U.S. Congress regarding a proposed constitutional amendment to protect victims of crime, Laurence H. Tribe opined that victims' rights are "indisputably basic human rights against government, rights that any civilised system of justice would aspire to protect and strive never to violate." These rights do not entail claims against private citizens; "rather, it is the government authorities themselves, those who pursue (or release) the accused or convicted criminal with insufficient attention to the concerns of the victim, who are sometimes guilty of the kinds of violations that properly drawn amendment would prohibit."<sup>13</sup> For Tribe, obviously, if victims' rights are to yield real capabilities of choice and action, rather than to remain as hollow verbal gestures, the major duty-bearer, namely, the government, needs to do something. However, as a collective body constructed and constrained by a constitutional and legal framework, what the government can and will do is a function of existing institutional structure and policy goals.

Given the above considerations, a victim's role in criminal procedure can only be effectively guaranteed where (1) current institutional structure can support this role without radical changes; (2) the role is consistent with the overwhelming policy goals of the criminal justice system, or at least is not causing significant difficulties for the achievement of those goals; (3) the role would be judicially enforceable without creating open-ended or otherwise unjustifiable financial burdens on the government.

<sup>12</sup> W. N. Hohfeld, *Fundamental Legal Concepts*, (W. W. Cook (ed.), Yale University Press, 1919), p.38.

<sup>13</sup> Statement of Laurence H. Tribe of Harvard University Law School, in *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings before the Senate Judiciary Committee*, 105<sup>th</sup> Congress, 1<sup>st</sup> Session (1997).

To consider whether current structure of judicial authority can support certain victims' rights, I shall rely upon Mirjan Damaška's model<sup>14</sup>. In the light of his model, China's criminal justice system is largely a policy-implementing one with crime control as its major policy goal<sup>15</sup>. Operating within a hierarchical structure<sup>16</sup>, this system relies on methodic, state-controlled inquests to maintain harmony and stability in society. Private contests are strictly controlled and individual rights are marginally concerned. Certain kinds of victims' participation in judicial process might be considered as a disturbance on the orderly functioning of the system.

Then we should consider which kinds of victims' participation shall be considered as a disturbance and which kinds may be considered as neutral or even beneficial to the smoothly operation of the system. On this aspect, I shall use Ian Edwards' models. Edwards distinguishes victims' right into two large categories: rights to services and rights to participation. Within the second categories, he further classifies two types: dispositive and non-dispositive. Rights to dispositive participation (RDP) shall guarantee that victims have certain degrees of control over the decision-making process. Sometimes their rights guarantee them a status of decision-makers, sometimes their rights impose a corresponding duty on the final decision-maker to enforce their opinions. Rights to non-dispositive participation (RNDP) allow victims to influence the decision-making but not to control it. This type of rights imposes a duty on decision-makers to take victims' input into account. Therefore, RDP promises control, and RNDP encourages consultation, information-provision, and expression.<sup>17</sup> Bringing Edwards' insights into Damaška's typology, we can easily find out that a hierarchical criminal justice system with a policy-implementation orientation can accommodate rights to service and RNDP without much hesitation, but may find it very difficult to embrace RDP.

<sup>14</sup> In his classical *The Faces of Justice and State Authority: a Comparative Approach to the Legal Process* (Yale University Press, 1986), Damaška builds a two-axis grid which can help observers to measure every conceivable mix of judicial organization and institutional purpose. Judicial authority can be organized either as a hierarchical structure or as a coordinate machinery, and it may pursue the objective of either policy implementation or dispute resolution. Using this grid to measure China's criminal procedure, we find a hierarchically structured policy implementation system.

<sup>15</sup> We can identify this goal by reading various official reports and scholarly writings. However, the easiest way is to read the text of Criminal Code. Article 2 makes it clear that the first and foremost goal of criminal law is "to use criminal punishments to fight against all criminal acts in order to safeguard security of the State."

<sup>16</sup> Hierarchy in China's judicial system has two distinctive aspects, one is its organization: there are four levels of courts in China, "the judicial work of people's courts at lower levels is subject to supervision by people's courts at higher levels" (Organic Law of the People's Courts of the People's Republic of China, Art 17, para.2, adopted in 1979 and amended in 1983). People's procuratorates are organized similarly; another is a detailed grading system for judicial officers, for examples, judges are graded into 12 ranks ( Law on Judges, Art 18, adopted in 1995 and amended in 2001).

<sup>17</sup> Ian Edwards, "An Ambiguous Participant: the Crime Victim and Criminal Justice Decision-Making," 44:6 *British Journal of Criminology* 967 (2004), esp 974-975.

With these two models in my tool box, I shall go on to analyze the current configuration of victims' rights in China's criminal justice system.

### **Current Legal Framework for Victims' Participation and its Diagnosis**

The 1979 Criminal Procedure law didn't confer on the victim a right to participate in criminal procedure as a party, except in cases of private prosecution. The 1997 amendment, however, confers such a right. Under the current law, victims have the following rights in criminal procedure:

#### *1. Victims' Right to Private Prosecution*

For cases appropriate for private prosecution, victims can directly file their cases in courts. There are three categories of cases appropriate for private prosecution, including:

- (a) Cases to be handled only upon the victim's complaint. These include: using violence to interfere with the freedom of marriage of others, abusing a member of one's family, conversion of property, insulting or defacing another person.
- (b) Minor criminal cases sufficiently proved by evidence presented by a victim, such as minor injury of another, refusing to carry out judgments or orders of people's courts, committing bigamy, cohabiting with or marrying a member of the armed forces in active service and abandonment.
- (c) Cases where the victim has evidence that her right of the person or property has been infringed. In private prosecution cases, victims should conduct investigation by themselves. The public security organ or the public prosecutor does not help victims in collecting evidence.<sup>18</sup>

Right to private prosecution is the most typical dispositive right for victims. It gives victims the decision-making power on initiation, investigation and prosecution. This right is legally constructed as a liberty-right rather than claim-right: victims are free to bring criminal charges against certain types of offenders, however, no one is under the duty to facilitate or support the prosecution. Victims are not given the right to legal representation in private prosecution cases. They may encounter significant difficulties when they are trying to "depose" witnesses. Witnesses are legally obliged to

<sup>18</sup> Criminal Procedure Law, Art 88.



answer questions from judicial authorities truthfully.<sup>19</sup> However, they are not under such a duty to answer questions from victims. Therefore, victims can hardly meet the evidentiary standards and many of them have to withdraw their cases even if their cases were initially accepted by courts.<sup>20</sup>

## 2. *Victims' Rights throughout the Criminal Procedure*

- (1) Right to legal representation: a victim and his legal representative or near relative of a public prosecution case and the parties and their representatives of supplementary civil proceedings shall have the right to entrust agents ad litem from the day on which the case is transferred for examination and prosecution. A private prosecutor and his legal representative of a private prosecution case and the parties and their legal representatives of incidental civil proceedings shall have the right to entrust their agents ad litem at any time. The people's procuratorate shall, within three days from the day on which the case files for examination and prosecution are received, notify the victim and his legal representative or near relative and the parties and their legal representatives of incidental civil proceedings their rights to entrust agents ad litem. The people's court shall, within three days from the day on which it decides to accept the private case, notify the private prosecutor and his legal representative and the parties and their legal representatives of incidental civil proceedings their rights to entrust agents ad litem.<sup>21</sup>
- (2) Right to ask for the withdrawal of certain officers: under any of the following circumstances, a member of the judicial, procuratorial or investigating personnel shall voluntarily shy away from the case, and any party concerned and its legal representative shall have the right to demand his obviation:
  - (a) if he is a party to the case or a near relative of the party to the case;
  - (b) if he himself or his near relative has an interest in the case;
  - (c) if he has served as a witness, expert witness, defender or agent in the case; or
  - (d) if he has any other relations with any party to the case that could affect the fair handling of the case.<sup>22</sup>

<sup>19</sup> *Ibid.* Art 45.

<sup>20</sup> See Han Yiqiong and Huang Wei, "Xingshi sifa zhong de zisiquan yu woguo xingshi zisu zhidu de chonggou" ("Right to Private Prosecution and Re-construction of the Institutional Framework of Private Prosecution in China") (2007) 5 *Falu yu shehui* (Legal System and Society) 65-66.

<sup>21</sup> Criminal Procedure Law, Art 40.

<sup>22</sup> *Ibid.* Art 28.

These rights are purely procedural ones and shall not burden the decision-making power significantly. They are well accepted and respected by the system.

### 3. *Victims' Rights in Reporting and Investigation Stages*

- (1) Right to Accuse: victims have the right to report or accuse on violations of their personal or property rights to the Police, Procuratorate or courts.<sup>23</sup>
- (2) Right to require the initiation of a case and to protest against a decision not to initiate a case: according to Articles 86 and 87 of the Law, if the accuser disagrees with the decision of not initiating a criminal case, he may apply for reconsideration. If the victim thinks the public security organ should have filed a case for investigation but has not yet filed the case and raises the matter to the people's procuratorate, the people's procuratorate shall demand the public security organ to give the reasons for not filing the case. If the people's procuratorate believes the reasons as not justified, it shall notify the public security organ to file the case, and the latter shall file it after receiving the notification.
- (3) Right to require additional or new expert evaluation: according to Article 121 of the Law, the investigating organ shall notify the crime suspect and the victim of the expert conclusions to be used as evidence. If the crime suspect or the victim makes an application, additional expert evaluation or new expert evaluation may be conducted.
- (4) Right to companion: according to Article 100 of the Law, when a victim under 18 years old is questioned, his legal representative may be notified to be present.

In this stage, victims' right to know the progress of criminal investigation is not guaranteed by law. A victim has a right to apply for administrative reconsideration if the police refuse to initiate a case. However, the agency which should accept such applications is not specified, and no time limit is set up for the reconsideration. Therefore, victims do not have a real remedy from administrative reconsideration. When the police refuse to initiate investigation on a criminal case, the only practical option left is to apply for the intervention by a people's procuratorate. From the data in Table 1, we can figure out how this procedure functions. When a victim applies to the people's procuratorate, her application shall be reviewed; if the people's procuratorate finds legitimate cause to intervene, it shall either require the police to initiate the investigation or require the police to give reasons on why not. The number of cases in which people's procuratorate intervened

<sup>23</sup> *Ibid.* Art 84.

varies and shows no clear trends of increasing or decreasing (see Table 1). Comparing this number with the number of recorded criminal cases, we get a sense that this number is small but not insignificant. For example, in 2004, police in China initiated investigation of 4,718,000 criminal cases (see Table 2). Of these cases, 22,575 were initiated upon the request of the people's procuratorate, constituting about 0.478 per cent of all recorded criminal cases in that year. Through the lens of Damaška's model, we can clearly see why victims' direct intervention (through application for administrative reconsideration) remains futile, and why the detoured intervention with the help from people's procuratorate renders certain positive results. The hierarchical structure of judicial authority honors internal communications and rejects external, unprofessional input.

**Table 1: Number of Cases in Which People's Procuratorates Supervised the Case Initiation Process<sup>24</sup>**

Year	Required to initiate investigation of cases	Require to give reasons why not to initiate investigation
1999	5,207	9335
2000	7,705	16306
2001	20,809	
2002	18,447	
2003	36,955	
2004	22,575	
2005	20,742	
2006	17,940	
2007	16,662	

<sup>24</sup> Data from the *Annual Report to National People's Congress by the Supreme People's Procuratorate, 1999-2007*. It is very interesting to notice that the number of cases in which people's procuratorates required the police to give reasons on why not to initiate cases was only provided for two years (1999 and 2000). It is highly possible that in later years the procuratorates simply required the police to initiate a case whenever they found it reasonable to do so, thus skipping the explanation process. This possible reason can explain why the number of cases in which the procuratorates required the police to initiate cases dramatically increased in 2001.

**Table 2: Number of Recorded and Solved Criminal Cases<sup>25</sup>**

Year	Number of Recorded Cases	Number of solved cases	Percentage of Cases in Which Arrests of the Suspected were approved	Percentage of Cases Being Prosecuted
1997	1,614,000	1,519,000		
1998	1,986,000	1,615,000		
1999	2,249,000	1,770,000		
2000	3,637,000	1,644,000		
2001	4,458,000	1,911,000	89.9%	97.8%
2002	4,333,000	2,454,000	92.42%	97.51%
2003	4,394,000	2,341,000	92.78%	97.33%
2004	4,718,000	2,468,000	95.39%	>99%

#### 4. Victims' Rights in the Prosecution Process

(1) Right to be informed: the people's procuratorate shall, within three days from the date of receiving the dossier of a case transferred for examination before prosecution, notify the victim and his legal representatives or near relatives and the party in an incidental civil action and his legal representatives that they have the right to entrust agents ad litem. The People's Court shall, within three days from the date of accepting a case of private prosecution, notify the private prosecutor and his legal representatives and the party in an incidental civil action and his legal representatives that they have the right to entrust agents ad litem.<sup>26</sup> In practice, this right has been enlarged: the people's procuratorate sometimes encloses a practical guide for victims of crimes which lists all procedural rights for victims in the notification.<sup>27</sup>

<sup>25</sup> Data exacted from *Zhongguo Falu Nianjian* (China Law Yearbook) (Beijing: China Law Yearbook Press, 1998-2005). Caution is needed when we rely upon the official data. We do not need to go further than the annuals themselves to discover inconsistencies and contradictions. For example, in the 2001 yearbook, it was reported that "In 2000, public security bureaus initiated investigations on 3,637,000 criminal cases with a 61.7% increase from the last year, and solved 1,644,000 criminal cases, 269,000 cases and 19.6% more than the last year." (*Zhongguo Falu Nianjian*, p 215). When we turn to the 2000 yearbook, the number of solved criminal cases was 1,770,000, not 19.6% less, but more. (*Zhongguo Falu Nianjian*, 2000, p 181.) This data was submitted by the Administration Office of the Ministry of Public Security. The institutional culture appears likely that there would be pressure to show "bad numbers" decreasing and "good numbers" increasing. However, because this is the only source of information on nationwide situation, we have no choice but to rely upon it with caution.

<sup>26</sup> Criminal Procedure Law, Art 40.

<sup>27</sup> See: Li Jinjin, "Gaozhi beihai ren quanli shu' youdai jinyibu wanshan" ("Notification to Victims on Their Rights' needs to be Furthered Improved") (2006) 3 *Renmin Jiacha* (People's Prosecution) 58.

- (2) Right to express opinions: the people's procuratorate shall solicit and consider opinions from the victims and persons entrusted by the victims while examining cases for prosecution.<sup>28</sup>
- (3) Right to protest against a decision of not prosecution: in common law jurisdictions, prosecutors usually enjoy unlimited discretion on whether and if so, how to prosecute. Under the 1997 Criminal Procedure Law, Chinese prosecutors don't have similar scope of discretion. Article 145 of the Law provides, if a decision not to initiate prosecution on a case involving victim(s) is made, the people's procuratorate shall send the written decision to the victim(s). If the victim disagrees with the decision, the victim may, within seven days of receiving the written decision, present a petition to the people's procuratorate at the next higher level and apply for the initiation of a public prosecution. The people's procuratorate shall notify the victim of the decision of reexamination. Where the people's procuratorate affirms the decision not to initiate prosecution, the victim may bring the matter before a people's court.
- (4) Right to turn a case of public prosecution into a case of private prosecution: the victim also may directly bring the matter before a people's court without undergoing the procedure of presenting a petition. When a people's court agrees to accept the case, the people's procuratorate shall transfer materials related to the case to the people's court.<sup>29</sup>

It seems that victims have been provided with extensive rights in this stage. Victims can ask for review of prosecutorial decisions, petition for prosecutorial reconsideration and even take over prosecutorial power. These roles for victims amount to a revolution in a hierarchical system with policy-implementation as its major goal. If victims actively pursue these roles, the methodical processing of criminal cases by the system shall be disturbed.

However, victims haven't played such active roles as promised by the law. In Table 3, we can see that the number of complaints against "not to prosecute" decisions varied from 1,796 in 2003 to 4,394 in 2000. In comparison with the total number of prosecuted cases (which can be found in Table 2), the number of this type of complaints is quite small. There have been no statistics on the number of "public turning into private prosecution" cases in the whole nation. In one empirical study conducted in Beijing, it was reported that there were no such cases in 2001 in the Capital.<sup>30</sup> The major reason is again the evidentiary bar. The law requires that victims should present sufficient evidence in private prosecution, otherwise the

<sup>28</sup> Criminal Procedure Law, Art 139.

<sup>29</sup> Criminal Procedure Law, Art 145.

<sup>30</sup> Zhao Yonghong, "Buqisu de shiji yunzuo, jiaqiang, yu gaijin" ("On the Operation, Enhancement and Improvement of 'Not to Prosecute' Mechanism") (2002) 6 *Guojia jianchaguan xueyuan xuebao* (*National Prosecutor's College Journal*) 88-94.

court shall not accept their cases. Only after a case is accepted by a court, the court shall require the procuratorate to transfer evidence. Without means and resources, victims can hardly meet the evidentiary requirement.

##### 5. *Victims' Rights in Trial and Appeal*

- (1) Right to make statements and raise questions: after the public prosecutor reads out the bill of prosecution in the court, the defendant and victim may make their respective statements on the crimes charged against in the bill of prosecution, and the public prosecutor may interrogate and question the defendant. The victim, and plaintiff and defender in a supplementary civil action, as well as agents ad litem may, with permission of the presiding judge, put questions to the defendant.<sup>31</sup>
- (2) Right to examine evidence: in the course of a court hearing, the parties, defenders and agents ad litem shall have the right to request new witnesses to appear before the court, to obtain new material evidence, and apply for the evaluation or inquest to be done once again. The court shall make a decision whether or not to grant approval to the aforesaid applications. Victims are active "parties" here.<sup>32</sup>
- (3) Right to require "protest" and make petition: a victim or his legal representative who refuses to accept the judgment of first instance of a local people's court at any level shall have the right, within five days after receiving the written judgment, to apply to the people's procuratorate to file a protest. The people's procuratorate shall, within five days after receiving such application, make a decision whether or not to file a protest and give a reply to the applicant.<sup>33</sup>

Due to certain loopholes in the law itself, victims' rights in trial and appeal stages may be handicapped. In October 2004, Cui and Song (a minor) robbed, abducted and raped Miss Wang, a high school girl, before murdering her. The trial court convicted the defendants of robbery, rape and murder, sentenced Cui to death, and sentenced Song to life imprisonment. The defendants appealed to the provincial high court. The high court reduced Cui's sentence to Death Penalty with two year suspension. The victim's parents only knew the result after the appeal process.<sup>34</sup> The law only guarantees victims a right to apply for prosecutorial protest, but no rights (including right to know) if the defendant appeals.

<sup>31</sup> Criminal Procedure Law, Art 155.

<sup>32</sup> *Ibid.* Art 159.

<sup>33</sup> *Ibid.* Art 182.

<sup>34</sup> On the facts of and controversies on the case, see Tian Qingchun, Chen Fan, and Wendao, "Etu qiangjian nugaozhongsheng hou sharen paoshi pansihuan yinzhengyi" ("Hoodlums Raped and Murdered a High School Girl, Got a Lenient Sentence of Suspended Death Penalty, Which Arouses Controversies"), available at <http://news.sina.com.cn/s/2005-12-22/14048653917.shtml> (visited 19 Dec 2007).

#### 6. Victims' Rights in Adjudicative Supervision Process

Right to petition against legally effective judgments: a party (victim included) or his legal representative or near relative may file a petition to a people's court or people's procuratorate against a legally effective judgment or ruling, however, the execution of the judgment or ruling may not be suspended.<sup>35</sup>

Adjudicative supervision (AS) is a unique arrangement in China's judicial system, through which a "final" enforceable or enforced judgment can be reopened and "corrected" if significant legal or factual errors are found. It is available for all types of cases. People's procuratorates are one of the authorities which have the power to initiate this procedure.<sup>36</sup> Crime victims usually petition the procuratorate to re-open their cases.

In Table 3, we can identify a clear trend of decline since 1997. The major reason might be that finality of judgment and authority of the judiciary have been incrementally enhanced with the progress of judicial reform<sup>37</sup>. Adjudicative Supervision initiated by petitions from victims may induce heavier punishment on the dependants, and thus violate certain procedural rights of the defendants, such as the right to be free from "double jeopardy".

<sup>35</sup> Criminal Procedure Law, Art 203.

<sup>36</sup> See Administrative Litigation Law, Arts 63 and 64 (adopted in 1989), Civil Procedure Law, Ch 16 (adopted in 1991 and amended in 2007), and Criminal Procedure Law, Ch 5.

<sup>37</sup> See Zhu Jingwen (ed.), *Zhongguo Falu Fazhan Baogao: Shujuku he Zhipiao Tixi* (Report on China Law Development: Database and Indicators) (Beijing: Renmin University Press, 2007), pp 238-240.

**Table 3: Number of Cases in Adjudicative Supervision Process<sup>38</sup>**

Year	Cases Taken in AS Process	Cases Decided in AS Process	Among the Decided Cases						Wrongful Judgments Identified (%)
			Judgments		Rulings		Mediation	Others	
			Main-tain	Change	Remand	Withdraw the Prosecution			
1994	23,196	25,283	15,344	5,803		628		3,508	22.95
1995	20,873	22,063	13,463	4,927		538		3,135	22.33
1996	19,269	19,437	10,685	5,429		470		2,853	27.93
1997	18,753	18,613	10,186	5,336		417		2,674	28.67
1998	13,514	14,196	8,157	3,138	319	30		2,552	24.35
1999	11,668	11,843	7,088	2,562	370	34		1,789	24.76
2000	9,343	9,836	5,359	2,287	393	49		1,748	27.25
2001	7,957	8,009	4,215	1,898	404	41		1,451	28.74
2002	4,182	4,625	2,085	1,512	260	49	29	690	38.31
2003	3,633	3,785	1,606	1,371	312	36	25	435	44.46
2004	3,445	3,331	1,259	1,371	308	36	22	335	50.41

### 7. Right to restitution

Victims' right to restitution is guaranteed by both criminal law and criminal procedure law. Article 36 of the Criminal Law provides that when the victim has suffered economic loss as a result of a criminal act, the defendant, in addition to receiving criminal punishment according to law, shall, according to the circumstances, be sentenced to compensate the economic loss. A corresponding provision in Criminal Procedure Law maintains that a victim "who has suffered material losses has the right, during the process of criminal procedure, to bring a supplementary civil action. If a state property or collective property has suffered losses, a public prosecutor, when initiating a public prosecution, may bring a supplementary civil action. When necessary a people's court may seal up or seize the defendant's property."<sup>39</sup>

The scope of restitution is limited to material losses caused by a criminal act. Therefore, even if a victim's right of personal name, portrait, reputation or honor has been infringed upon; he cannot demand restitution for the loss. More specifically, restitution becomes legally possible only under the following circumstances:

<sup>38</sup> Data exacted from *Zhongguo Falu Nianjian (China Law Yearbook)* (Beijing: China Law Yearbook Press, 1995-2005). The number of received cases is smaller than the number of decided cases because cases received during previous years might be decided in every specific year.

<sup>39</sup> Criminal Procedure Law, Art 203.



- (1) If his property right has been infringed upon, the victim shall have the right to demand restitution. If the property can be returned or its original condition can be restored, the property shall be returned or restored. If not, corresponding restitution shall be paid. If other damages are done to property rights, restitution shall be paid for the direct losses.
- (2) If his right to life and health has been infringed upon, the victim shall have the right to demand restitution:
  - (a) In the case of bodily injury, medical expenses and loss of income, due to missed working time, shall be paid;
  - (b) In the case of loss of working capability, medical expenses and disability restitution shall be paid. Living expenses shall also be paid to persons who have no working capability and are being supported by the victim;
  - (c) If death results, restitution for the death and funeral expenses shall be paid. Living expenses shall also be paid to those who have no working capability and were supported by the deceased prior to his / her death.

In 1998, Miss Yao was raped by an Australian Chinese, Mr Liu. Mr Liu was convicted and sentenced to 12 years' imprisonment. In her supplementary civil action, she claimed US\$100,000 compensation for mental distress. The court rendered a decision to reject this claim on the basis of Article 77 of the Criminal Procedure Law. Miss Yao appealed to the High Court of Guangdong Province. The court instructed her to bring an independent civil case. Miss Yao filed a civil case at Luohu District Court claiming the compensation. The court rendered 80,000 RMB compensation for violation of the victim's rights to "physical health and virginity" (the victim was a virgin when she was raped). However, upon appeal, the decision was overturned by Shenzhen intermediate court.<sup>40</sup> The court interpreted Article 203 of the Criminal Procedure Law as excluding restitution for non-material loss and relied upon a document issued by Supreme People's Court<sup>41</sup> to support its decision. However, that regulation only applies to supplementary

<sup>40</sup> Li Guiru, "Bei qiangjian hou, nengbuneng yaoqiu jingshen peichang: quanguo shouli yin qiangjian yinqi de jingshen sunhai peichang'an yinfa zhengyi" ("Can a Rape Victim Claim Compensation for Emotional Distress: Controversies around the First Case in Which a Rape Victim Claimed Compensation for Emotional Distress"), *Zhongguo Qingnian Bao* (China Youth Daily), 25 May 2001. Available at <http://unn.people.com.cn/GB/channel2/3/13/200105/25/64950.html>.

<sup>41</sup> Zhuigao Renmin Fayuan Guanyu Xingshi Fudai Minshi Susong Fanwei Wenti de Guiding (Supreme People's Court Regulations on the Scope of Supplementary Civil Litigation in Criminal Cases), *Zuigao Renmin Fayuan Gonggao* (Official Bulletin of Supreme People's Court), *Fashi* (2000), No.47. This document limits the scope of restitution to actual material loss and material loss which "shall certainly occur."

civil litigation. In July 2002, Supreme People's Court issued a new judicial interpretation, which clearly provides that people's courts in China shall not accept victims' claims on compensation for emotional distress, either as part of supplementary civil action, or as part of independent civil action after the criminal trial.<sup>42</sup>

Even within this narrow scope of legally possible restitution, a huge gap between law and reality exists. In as many as 80 per cent of supplementary civil actions, victim got nothing from the defendant. Even when the victim won a judgment, they only got an "empty promise from law".<sup>43</sup> A very typical case is the widely reported Ma Jiajue Murder case. Ma Jiajue was a student in Yunnan University. He murdered four of his classmates over minor disputes. In the supplementary civil actions brought by three families (one family decided not to bring supplementary civil action because they knew that they would receive little), 820,000 RMB was claimed. In the subsequent court investigation, judges discovered that the only property owned by Ma was a second-hand desktop computer. He depended on state-subsidised loan for his study and living in the university. The court finally rendered a judgment requiring Ma to pay 20,000 RMB to each of the three families. Even this moderate amount of restitution may still remain unpaid.<sup>44</sup> Many criminals are as poor as or even poorer than Ma Jiajue. Therefore, chances of victims receiving restitution from their offenders are quite low.<sup>45</sup>

China's current criminal procedure law has provided a comprehensive set of rights for crime victims. However, it becomes more and more evident that victims are not satisfied with those rights. A leading official newspaper on legal matters even published an editorial claiming that "victims' rights have almost been forgotten"<sup>46</sup>. According to official statistics, during recent years, among all of the petitions sent to people's procuratorates requiring

<sup>42</sup> Supreme People's Court, "Zuigao renmin fayuan guanyu renmin fayuan shifou should xingshi anjian beihairen tiqi jingshen sunhai peichang minshi susong wenti de pifu" ("A Reply from Supreme People's Court on Whether People's Courts Should Accept Civil Law Cases in Which Crime Victims Claims Compensation for Emotional Distress"), *Zuigao Renmin Fayuan Gonggao* (Official Bulletin of Supreme People's Court), Fashi (2002), No.17.

<sup>43</sup> Liqing and Sunqian, "Goujian hexie shehui jidai jianli xingshi beihairen guojia buchang zhidu" ("The Construction of Harmonious Society Depends on the Establishment of State Compensation for Crime Victims"), *Fazhi Ribao* (Legal Daily), 14 March 2007.

<sup>44</sup> On the facts and procedural history of Ma Jiajue case, see the serial report of Xinhua News Agency: <http://www.yn.xinhuanet.com/topic/2004/mjj/>. Ma Jiajue was sentenced to death and executed on 17 June 2004.

<sup>45</sup> See Fang Baoguo, *Beihairen de Xingshi Chengxu Baohu* (Protection of Victims in Criminal Procedure) (Beijing: Law Press China, 2007), pp 350-355.

<sup>46</sup> Wang Doudou and Zhang Qingshen, "xingshi beihairen quanli jibei yiwang, 'liang-gao' heli poti" ("Victims' Rights Have Almost Been Forgotten, Two 'Supremes' Join Force to Solve the Problem"), *Fazhi Ribao* (Legal Daily), 28 August 2007. Available at <http://www.chinanews.com.cn/gn/news/2007/08-28/1012127.shtml>.

adjudicative supervision, about 30 per cent are from crime victims. In 2006, the percentage even rose to 37.8 per cent<sup>47</sup>. Many more complaints have not been voiced through this institutional channel, but via media or other informal channels. These avowed grievances of victims have been regarded as one of the major obstacles to the construction of a harmonious society in China<sup>48</sup>.

**Table 4 Victims' Complaints to People's Procuratorate<sup>49</sup>**

	1998	1999	2000	2001	2002	2003	2004
Complaints against "not to arrest" decisions	1,917	2,636	3,263	2,917	2,350	803	559
Complaints against "not to prosecute" decisions	3,057	3,307	4,294	4,396	3,848	1,796	2,334
Complaints against "cancellation of cases" decisions	1,397	1,224	1,126	781	590	258	186
Complaints against judgments in criminal cases	20,472	24,213	29,469	23,979	23,730	5,221	5,758

Why are crime victims still unsatisfied when they have been equipped with so many rights? After scanning the general situation of victims' rights in China's criminal justice system in the light of Damáska and Edwards' models, some general observations can be drawn:

- (1) victims' participatory rights in criminal procedure haven't functioned well because either the corresponding duty-bearers are not clearly identified by law or they are not functionally and structurally positioned to perform the duty;
- (2) the more dispositive the right is, less likely it can be realised;
- (3) social and economic conditions add further complexities to victims' plight. Some rights (such as the right to restitution) cannot turn

<sup>47</sup> See Wang Doudou and Zhang Qingshen (n 28 above).

<sup>48</sup> Discussions on how unaddressed victims' grievances are disturbing social harmony are abundant in academic journals and policy forums. See Ruan Shiping, "Goujian hexie shehui jixu xingshi beihai ren guojia buchang zhidu" ("To build up a harmonious society we need state compensation to victims urgently"), *Chief Procuratorates' Forum*, 30 August 2007. Available at <http://www.cnjccn.com/showinfoclass.asp?id=4808>.

<sup>49</sup> Data exacted from *Zhongguo falu nianjian* (China Law Yearbook) (Beijing: China Law Yearbook Press, 1998-2005).

into actual benefits because of material constraints. To improve victims' satisfaction without undertaking radical reforms in the system, some fine-tuning of the focus is needed.

### New Models to Facilitate New Possibilities

As discussed above, the judicial system in China has been focused on the policy goal of crime control since 1979. In 1996, when the Criminal Procedure Law (1979) was amended, the major purpose was to incorporate due process values and keep a balance between crime control and human rights protection.<sup>50</sup> The dominant theoretical model underlying the amended criminal procedure law is Herbert Packer's two models of criminal procedure: crime control and due process.<sup>51</sup> The crime-control model envisages the criminal process as a high-speed "assembly-line conveyor belt" operated by judicial personnel with the sole aim of producing as many convictions as possible.<sup>52</sup> On the contrary, the due-process model envisions the criminal process as an "obstacle course" in which defense lawyers try to defeat the prosecution's case by arguing that the accused' rights have been violated.<sup>53</sup> Packer explicitly admitted that his models are produced through reflections on American institutional reality. He told us:

Ours is not a system of legislative supremacy. The distinctively American institution of judicial review exercises a limiting and, ultimately, a shaping influence on the criminal process. Because the Crime Control Model is basically an affirmative model, emphasising at every turn the existence and exercise of official power, its validating authority is ultimately legislative (although proximately administrative). Because the Due Process Model is basically a negative model, asserting limits on the nature of official power and on the modes of its exercise, its validating authority is judicial and requires an appeal to supra-legislative law, to

<sup>50</sup> See Chen Guangzhong, "Lun xingshi susongfa xiugai de zhidao sixiang" ("On the Guiding Ideas on Amending the Criminal Procedure Law") (1995) 4 *Fazhi yu Shehui Fazhan* (Law and Social Development) 43-49. Professor Chen was the leading scholar preparing the draft amendment.

<sup>51</sup> Reference to Packer's two models can be found in many authoritative writings on criminal procedure in China. For example, in a proposed amendment to Criminal Procedure Law prepared by several leading scholars, "control of crimes" and "protection of human rights" was identified as the major purpose of criminal procedure and prescribed in the first Article. See: Xu Jingcun et al., *Zhongguo Xingshi Susongfa (Di'er xiuzheng'an) Xuezheng Nizhigao ji Lifa Liyou* (The Second Amendment to China's Criminal Procedure Law: Scholars' Draft and Reasons) Beijing: Law Press China, 2005), p 3.

<sup>52</sup> Packer, Herbert, *The Limits of the Criminal Sanction* (Palo Alto, CA: Stanford University Press, 1968), p 159.

<sup>53</sup> *Ibid.* p.163.

the law of the Constitution.<sup>54</sup>

Embedded in this context, Packer's models are characterised by the following presuppositions:

- (1) There is an adversarial relationship between judiciary and legislature (with the administrative branch of government as its agent). While the legislature and the administration serve the public order as an important condition of human freedom by controlling crimes, the judiciary serves the integrity of law and human rights as the final guarantee of human dignity by reviewing and thus interfering with the regulatory efforts. Packer compares this kind of confrontation to the relationship between an assembly line and an obstacle course.
- (2) However, this confrontation is not ceaseless and without a result, because "in our system the appeal to the Constitution provides the last and the overriding word,"<sup>55</sup> and the Court has been nominated as the guardian of this supra-legislative law.

China's political and legal environment is quite different from the America's. The National People's Congress is the highest organ of state power; legislative power is just one of its many powers.<sup>56</sup> Courts and people's procuratorate are subordinate and accountable to people's congresses.<sup>57</sup> Courts cannot review laws and regulations made by various levels of people's congress. The relationship between various judicial organs (courts, people's procuratorate and the police) is not one of check and balance, but one of cooperation.<sup>58</sup> Although the defense have been granted with extensive rights in the amended criminal procedure law, without a neutral and strong court, due-process "obstacles" cannot perform well.<sup>59</sup> In China, both victims and defendants enjoy unfulfilled legal rights. To go out of this theoretical trap, we need a new model.

Roach helps us to break away from Packer's court-centered models with his new models. By bringing the missing prince (victims) back to the play of Hamlet (criminal process), he sets up his models to enable a more fruitful

<sup>54</sup> Herbert L. Packer, "Two models of the Criminal Process," (1964) 113 *University of Pennsylvania Law Review* 1, 22.

<sup>55</sup> *Ibid.* p.22.

<sup>56</sup> *Zhonghua Renmin Gongheguo Xianfa* (The Constitution of People's Republic of China), Arts 57 and 58.

<sup>57</sup> *Ibid.* Arts 128 and 133.

<sup>58</sup> *Ibid.* Art 135.

<sup>59</sup> See Hualing Fu, "When Lawyers are Prosecuted: The Struggle of a Profession in Transition" (May 2006). Available at Social Science Research Network : <http://ssrn.com/abstract=956500>.

debate between different groups of people in our diversified society. Under the criminal control / due process models, criminal process is just an affair between courts and other branches of government. Victims and the general public have no role to play in this process, which has significant impact on their life.

While criticising vigorously the inadequacies of Packer's models, Roach admires Packer's ambition to make his models "a framework for considering the dynamism that appears to characterise present-day trends in the evolution of the criminal process."<sup>60</sup> As Roach told us, his new models are:

"based on different conceptions of victims' rights. Like Packer's crime control and due process models, they aspire to offer positive descriptions of the operation of the criminal justice system, normative statements about values that should guide criminal justice, and descriptions of the discourses which surround criminal justice. Models based on victims' rights can thus describe phenomena such as the new political case which pits the accused against crime victims or minorities and other groups associated with crime victims, or restorative justice practices which bring crime victims and their supporters together with offenders and their supporters."<sup>61</sup>

However, Roach's ambition is not limited to provide new models as supplements to Packer's models, which are based on the Canadian practices and which can help us to predict the future development of Canadian criminal process. He also hopes that his models would not be restricted by any assumptions about "the limited, liberal nature of governance or the central place of an adversarial system staffed by public sector professionals."<sup>62</sup> This kind of modeling, if successful, will be more general and can be used by lawyers in different legal traditions to understand and / or improve the performance of their own systems. Such an effort should be based on a deep understanding of the interaction between law and politics. Thus, it is unsurprising that Roach subtitled his book as *The New Law and Politics of Criminal Justice*.

Roach wants to find good answers to these problems. To him, an effective theory of criminal process must be based on a right understanding of the interaction or dialogue between various actors in this field. Furthermore, he recognised that criminal justice should not be embedded in a

<sup>60</sup> *Ibid.* p.2.

<sup>61</sup> Kent Roach, "Four Models of the Criminal Process," (1999) 89 *Journal of Criminal Law and Criminology* 671, 673-674.

<sup>62</sup> Kent Roach, *Due Process and Victims' Rights* (Toronto: University of Toronto Press, 1999), p 28.

single framework of justification, namely, retributive justice. There exists another source of legitimacy for criminal process—restorative justice. Based on these insights, he built up his two victim-oriented models. While the “Punitive Model of Victims’ Rights” has inherited a lot of elements from Packer’s Criminal Control Model, it embodies some new elements which differs itself from Packer’s model. At first, “there is much less deference to legislators, police, and prosecutors in the punitive model than in the crime-control model. Petitions, advocacy, and private members bills may be used to jump-start the legislative process. Police and prosecutors may find their work subject to critical scrutiny not only from the accused, but from victims and their representatives.”<sup>63</sup> Under pressure from victims and their groups, the regulatory agencies have to restrain from their pursuit for efficiency: “Plea bargaining, despite its centrality in the crime-control model, is suspect because it does not include victims or meet their expectations.”<sup>64</sup> Secondly, although both crime-control model and punitive model of victims’ rights oppose due-process claims because they divert attention from factual guilt and allow the criminal to go free, they do this for different reasons. The punitive model, according to Roach, “counters due-process claims by putting forward the argument that victims and groups of potential victims have rights which deserve respect.”<sup>65</sup> Finally, the punitive model challenges the idea of victimless crime by pointing out the actual victims of such crimes.

Despite these new elements, punitive model of victims’ rights still relies on the crime-control function of the regulatory agencies to support victims’ claims. The real alternative is the non-punitive model of victims’ rights, which shifts the focus from state-controlled retribution to victim-concerned restoration. As Roach provocatively argued:

“A concern about victims does not produce an inescapable dynamic towards reliance on the criminal sanction and punishment. An alternative direction is away from the roller-coaster of relying on an inadequate criminal sanction and countering due-process claims and towards the prevention of crime and restorative justice once crime has occurred.”<sup>66</sup>

While building his non-punitive model of victims’ rights, one of the major targets Roach wants to criticise and redress is the criminalisation of politics. As he has seen:

<sup>63</sup> *Ibid.* p 30.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.* p 31.

<sup>66</sup> *Ibid.* p 33.

“... in the 1980s and the 1990s, legislatures frequently turned to criminal justice reforms in an attempt to better protect victims and potential victims of crimes, including women, children, and various minorities. ... This process of criminalization began when legislatures, courts, and the media focused on criminal justice issues that were symptoms of social, economic, political, and cultural problems.”<sup>67</sup>

The crime-control model, the due-process model and the punitive model of victims' rights are all promoters of this trend, because they are all punitive in nature. Roach has insightfully summed up the causes of this trend:

- (1) The government, restricted by its limited fiscal capacity, relies on the relatively cheap method of intervention—namely, the criminal sanctions—to address a lot of social problems which can be better solved through some more expensive interventions.
- (2) The symbolic struggle between due process and victims' rights, which attracts a disproportionate amount of attention from the media and legislatures, produces conditions conducive to the criminalisation of politics.

Through his criticism of the criminalisation of politics, Roach shows a good sense of balance: although he is not reluctant to recognise the interaction between law and politics, he also wants to put this interaction in a normative structure, which can keep the institutional dialogue on the one hand, and maintain the relative independence of legal system on the other. In his mind, law is not omnipotent, much still less the punitive function of law. The government should not shift off its responsibility on social welfare and social justice by putting everything into the cheap assembly line of criminal justice. The non-punitive model, with its emphasis on the real needs of victims, is the only alternative to redress this undesirable trend. As suggested by Roach, any institutional efforts to address victims' rights should be based on the following understandings:

- (1) The criminal justice system is not the only available resource to address the problem of crime. There exist many alternatives, which include private police force (although not so desirable), neighbourhood watch as well as the self-policing of families and communities. Thus, a successful project on crime-control should be able to involve and coordinate these different resources. As Roach told us,

<sup>67</sup> *Ibid.* p 4.



“Most critics and defenders of due process have focused too much on the courts. The courts frequently did not have the last word, and media, legislative, and administrative responses to their rulings were not studied enough.”<sup>68</sup>

- (2) The victims are the best judges of their own interests. When they choose not to report the crime, it is probably because: “they have found a better way to deal with their victimization that may draw upon strategies such as avoidance, shaming, apologies, and informal restitution ... They may also judge the matter to be too minor or inconvenient to justify official intervention or prefer the privacy, time, and control of non-reporting.”<sup>69</sup> Therefore, the decision-making process should invite the participation of victims.
- (3) Retribution is not the only legitimate object of criminal process; this process should take other matters into account, such as healing, compensation, as restorative justice.

### Feasible Plans for Future Development

The non-punitive model of victims’ rights can better serve victims’ interests in China not only because it guarantees a central role for victims in the criminal process, but also because it requires no radical reforms on the current institutional structure. In the following paragraphs, I shall discuss two possible directions of development from the perspective of this model.

#### *1. Improvement of the Legal Framework*

Three types of rights which shall not disturb the achievement of policy goals and orderly functioning of the system should be developed: right to service, right to welfare (state compensation), informational rights (the right to know and to be heard). Among these rights, the right to state compensation has been seriously considered by the authorities.

##### **A.Right to State Compensation**

Despite the spectacular economic development since 1979, China remains a relatively poor country in terms of GPD per capita. In many criminal cases, both offenders and victims are poor, and restitution may be practically impossible. Therefore, state compensation for victims is essential for the restoration of victims’ well-being. However, as Randy Peerenboom has discovered:

<sup>68</sup> *Ibid.* p 7.

<sup>69</sup> *Ibid.* p 33.

"In response to victims' demand for a state-funded compensation system, the government can plead poverty. China is not a rich country. Arguably, it simply does not have the funds to make victims whole. Given the traditional emphasis on family, the state may also believe that family members have a duty to support each other in difficult times."<sup>70</sup>

When a defendant is sentenced to limited term imprisonment, life imprisonment or death penalty with two year suspension, he shall work in prison without payment, which is called "reform through labour." Although Chinese authorities denied the accusation that China's economy heavily depends on prisoner's labour, it was openly recognised that China's prison system contributes a lot to the economy.<sup>71</sup> Even people sentenced to death contribute to the purse of the state: it is estimated that roughly 95 per cent of "donated" organs came from cadaveric donors in China, and nearly all of them were taken from executed prisoners.<sup>72</sup> Therefore, the state is obliged to establish a victim's fund to pay compensations to eligible victims.

In March 2007, during the 5<sup>th</sup> Session of the 10<sup>th</sup> National People's Congress, Mr. Sun Qian, a people's representative from Jiangxi Province and also the Chief Procurator in that province, proposed a Law on State Compensation for Crime Victims. This proposal is being considered by the Standing Committee of National People's Congress.

Victims' rights were mentioned for the first time in the annual report to National People's Congress by the Supreme People's Court in 2007. Mr. Xiao Yang, the president of SPC, reported, courts:

"shall protect crime victims and their families' legal rights and interests according to law, try to find out effective ways to help and compensate for crime victims. According to the statistics in 10 Provincial High Courts which are experimenting [on victim compensation], 378 crime victims and their family members received 7,802,400 RMB as compensation in 2006."<sup>73</sup>

<sup>70</sup> Randy Peerenboom, "The Victim in Chinese Criminal Theory and Practice: A Historical Survey," (1993) 7 *Journal of Chinese Law* 63, 107.

<sup>71</sup> For example, in 1998, the prison system in China produced a total value of 40 billion RMB, or 0.5 per cent of the GNP. See Li Yu, "What Are We Striving for? The 54 Year History of Prisons in New China," *Legal Daily*, 29 Dec 2003.

<sup>72</sup> See Ding Chunyan, "How Far Do China's New Interim Provisions on Organ Transplants Go?" (2006) 36 3 20 *Hong Kong Law Journal*, 616.

<sup>73</sup> Xiao Yang, "Supreme People's Court's Annual Report to National People's Congress," read at the Fifth Session of the Tenth National People's Congress on 13 March 2007, *Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Gongbao* (Gazette of the Standing Committee of the National People's Congress), No.2, 2007, p.228.

### B. Development of informal arrangements: experiments with restorative justice

Restorative justice is described as a distinctive mode of decision-making process which enables those who have a stake in a specific offence to “do justice”, and by collectively resolving how to deal with its aftermath and also its implications for the future.<sup>74</sup> It is an ascending concept in global public discourse. John Braithwaite points out two major values of the conception: one is healing relationships, as opposed to balancing hurt with hurt; another is community deliberation, which is problem-oriented, rather than punishment-obsessed.<sup>75</sup> Howard Zehr identifies repair, reconciliation, and reassurance as the three basic values of restorative justice.<sup>76</sup> The idea of restorative justice was also officially endorsed by the United Nations’ Economic and Social Council in a 1999 resolution:

Restorative justice is usually understood as a response to crime that emphasizes the importance of the offender making reparation to the victim. Often the nature of this reparation is worked out in face-to-face or indirect mediation between victim and offender (mediation which can also involve some kind of facilitator; a local police officer; a social worker; family, friends or members of the local community).<sup>77</sup>

Roach’s non-punitive model of victims’ rights embraces this concept warmly and comfortably. Actually, this model needs two values to form a circle, namely, crime-prevention and restorative justice<sup>78</sup>. Restorative justice is also in perfect harmony with legal process scholarship. The pragmatic approach employed by legal process scholars always attempts to “understand competing perspectives and achieve some reconciliation between them.”<sup>79</sup>

Restorative justice added a normative dimension to Roach’s new models. As Professor Ernest J. Weinrib told us, law is not a collection of posited norms or an exercise of official power, but a social arrangement responsive to moral argument.<sup>80</sup> Thus, we always need a theory or model to justify our legal claims, arguments or decisions. The traditional theories of criminal

<sup>74</sup> T. F. Marshall, *Restorative Justice: An Overview* (London: Home Office Research, Development and Statistics Directorate, 1999), p 5.

<sup>75</sup> John Braithwaite, “Restorative Justice and Social Justice,” (2000) 63 *Saskatchewan Law Review* 185.

<sup>76</sup> “Crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.” Zehr, Howard, *Changing Lenses: A New Focus for Crime and Justice*, (Scottsdale, PA: Herald Press, 1990), p 181.

<sup>77</sup> United Nations, Economic and Social Council, *Development and Implementation of Mediation and Restorative Justice Measures in Criminal Justice*, 28 July 1999.

<sup>78</sup> Roach (n 63 above), p 33.

<sup>79</sup> *Ibid.* p 7.

<sup>80</sup> Ernest J. Weinrib, “The Jurisprudence of Legal Formalism,” (1993) 16 *Harvard Journal of Law and Public Policy* 583.

law employ the concept of retributive justice to justify criminal sanctions, but this concept cannot provide satisfactory justification if the victims don't want or need the punishment but demand something else. Restorative justice as a normative structure enables the victims to choose the remedies which really make sense to them.

In China, restorative justice has been gradually institutionalised through various criminal reconciliation arrangements. For example, in July 2004, the High Court, Provincial People's Procuratorate and Bureau of Public Security in Zhejiang Province jointly issued an "Opinion on How to Apply Law in Dealing with Minor Injury Cases," in which it is suggested that under the following conditions the police may cancel a case and the prosecution may decide not to prosecute:

- (1) the victim and the offender enter into a written agreement on compensation;
- (2) the victim excused the offender and sent a written statement to the authorities to that effect;
- (3) the offender shows sincere remorse and it becomes evident that he shall do no further harm.

Similar normative documents have come into effect in Shanghai, Beijing and Hunan. A case in Longhui County of Hunan Province can show us how this works. Luo, a 17 year old boy, beat Wang intentionally, and hurt him badly. Luo was a high school graduate and was preparing for the National College Admission Exam at the time. His family agreed to pay full compensation to Wang. After hearing the opinion of Wang and his family, people's procuratorate in the county decided not to prosecute Luo. Luo succeeded in the exam and was admitted to a university in Shanghai.<sup>81</sup>

## Conclusion

Statutory provisions on victims' rights can only be functional within a supporting structure of judicial process and state authority. When the state adopts a hierarchical ordering of judicial power and uses this power to achieve its policy goals, victims' role in criminal process cannot be dispositive. The state would be willing to allow victims to express their emotion, provide information and play a consultative role in the process, but may

<sup>81</sup> Teng Bin, Luo Jiahuan & Jiang Wang: "Hunan experiments Criminal Reconciliation, Minor Criminal Cases Can Be Settled Privately," *Sanxiang City News* ( 三湘都市报 ), 22 Nov 2006.

not be supportive to victims' role in decision-making. State compensation and services for victims are also compatible with the policy goals because they incur no additional burdens on formal criminal procedure. Considering China's particular social and institutional environment, a feasible approach to protect victims' interests should contain two tracks: the development of service and welfare provisions for victims of severe crimes on one side, and the development of informal dispute resolving arrangements for minor offences on the other. In the absence of a strong rights-protection culture, welfare might be more beneficial for victims than rights, as Wang Qiong's case shows us at the beginning of this article. In some cases, such as the stolen motor cycle case, when reconciliation between victims and offenders is possible, the state should endorse, rather than suppress, informal arrangements between private parties. In those cases, private arrangements facilitate dispute resolution and restoration without undermining judicial authority and burdening the formal legal process.

